(3)

Supreme Court, U.S.
FILED
MAY 4 - 2000
CLERK

No. 99-1367

IN THE

Supreme Court of the United States

AMILIA ABBOTT, *et al.*,

Petitioners,

v.

MEDGAR EVERS HOUSES ASSOCIATES, L.P., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

RICHARD J. WAGNER
COUNSEL OF RECORD
MARTIN S. NEEDELMAN
PAUL J. ACINAPURA
JIM E. PROVOST, OF COUNSEL
BROOKLYN LEGAL
SERVICES CORP. "A"
80 JAMAICA AVENUE
BROOKLYN, NEW YORK 11207
(718) 487-1300

LISA E. CLEARY
FREDERICK B. WARDER
NAOMI J. SCHRAG
PATTERSON, BELKNAP,
WEBB & TYLER, LLP
1133 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK
10036-6710
(212) 336-2000

Attorneys for Petitioners

12 pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

POINT I: RESPONDENTS MISSTATE THE HOLDING OF THE COURT BELOW 1

POINT II: RESPONDENTS' CONTENTION THAT PETITIONERS' INJURIES WERE ATTENUATED AND INDIRECT, AND THAT HUD WAS THE ONLY DIRECTLY INJURED PARTY, IS ERRONEOUS AS A MATTER OF FACT AND LAW 5

CONCLUSION 8

TABLE OF AUTHORITIES

PAGE

CASES

Brandenburg v. Seidel,
859 F.2d 1179 (4th Cir. 1988) 4

County of Suffolk v. Long Island Lighting Company,
907 F.2d 1295 (2d Cir. 1989) 5

Holmes v. Security Investor Protection Corp.,
503 U.S. 258 (1992) 3, 5, 6

Mid-Atlantic Telecom, Inc. v. Long Distance Services,
18 F.3d 260 (4th Cir. 1994) 4

Moore v. Paine Webber, Inc.,
189 F. 3d 165, 169-70 (2d Cir. 1999) 3

STATUTES AND REGULATIONS

18 U.S.C.§1961 1

PRELIMINARY STATEMENT

Petitioners respectfully disagree with Respondents' statement that the instant case is no more than "a prosaic landlord-tenant dispute." On the contrary, the embezzlement of millions of dollars in federal rent subsidies and direct rent payments — funds which are statutorily and contractually mandated to provide these low-income tenant Petitioners with safe, decent and sanitary housing — cannot and should not be so disdainfully dismissed.[1]

Respondents' attempt to trivialize the nature of Petitioners' claims against them, in fact, seeks merely to divert attention from the consequences of their decade of racketeering and immunize Respondents from the civil relief accorded by 18 U.S.C.§1961, *et seq.*

POINT I: RESPONDENTS MISSTATE THE HOLDING OF THE COURT BELOW

In a strange turnabout from their position below, Respondents no longer assert that, in order to satisfy the direct injury component of RICO causation, the party deceived by the predicate acts must be the same as the party injured by them (i.e., "convergence theory"). Instead, they now claim that convergence theory is neither the law nor the holding of

---

[1] The statement in Respondents' Brief, at page 1, that this action is "symptomatic of the types of cases that have deluged the federal courts in recent years", is not only entirely outside the record; there is absolutely no evidence of its truth. If, in fact, there has been such a deluge, it is far more likely to originate with the financial and business sectors and to involve commercial disputes, rather than actions by discrete low-income groups such as Petitioners.

the Court below. Respondents' Brief, at pp. 8-9. Respondents' argument not only contradicts their earlier position; it flatly misstates the decision of the Court below. Although Respondents cite selected portions of the decision below, conspicuously absent is the clear, unambiguous language embracing "convergence theory." Specifically, the Court below held:

> As the district court concluded, the tenants *can allege no direct injury because the defendants' misrepresentations were made only to HUD.* The tenants' injuries are therefore *necessarily derivative of injuries sustained by HUD.* Because such derivative injuries are insufficient to establish proximate cause . . . *the tenants cannot establish the loss causation necessary for RICO standing.*

(App. at 6a) (Emphasis added).[2]

This holding, that Petitioners are categorically excluded as a matter of law from establishing direct injury because the fraudulent mailings were transmitted to HUD, rather than to them, is a clear and unambiguous adoption of convergence theory. Thus, the conflict between the Second Circuit Court of Appeals and the Courts of Appeal for the First, Third and Fifth Circuits is clear.

Not only have Respondents reversed their position as to convergence theory; they also seem to agree with Petitioners that there should not be any "reliance" requirement

---

[2] References are to the Appendix annexed to Petitioners' Petition for a Writ of Certiorari. These references are designated (App. at [page]).

imported into the mail and wire fraud statutes. But they again misstate the holding of the Court below by claiming that it does not, in fact, require reliance on the misrepresentations that constitute the acts of mail fraud. Respondents' Brief at 14.

In arguing that such "reliance" was not required by the Court below, Respondents again manage to omit any reference to the plain language of the decision:

> The causation requirement, which is jurisdictionally mandated, has two different components. There must be 'transaction causation', *meaning that the misrepresentation must have led the plaintiffs to enter into the transactions at issue. . . .*

(App. at 6a, citing *Moore v. Paine Webber, Inc.*, 189 F. 3d 165, 169-70 (2d Cir. 1999)) (Emphasis added).

Respondents fail to explain how acts of mail fraud could possibly "have led the plaintiffs to enter into the transactions at issue . . ." *unless* the plaintiffs were aware of and had acted in reliance upon them. Thus, not only does this case establish the clear conflict between the Second Circuit and the First, Third and Fifth Circuits on this issue of judicially importing a reliance element into the mail and wire fraud statutes, that conflict is also established by the decision in *Moore v. Paine Webber, Inc., supra*, which the decision below invokes.

Moreover, it is evident that the case-by-case, common law proximate cause inquiry set forth in *Holmes v. Security*

Investor Protection Corp., 503 U.S. 258 (1992), and cited by Respondents, was precluded in this case by:

- the legal conclusion of the Court below that the mere *divergence* of identity alone between the party deceived by the mailed misrepresentations and the party injured rendered it *necessarily* impossible for Petitioners to establish "loss causation"; and

- the legal conclusion of the Court below that "transaction causation" cannot be factually established by any means other than showing that the mailed or wired misrepresentations *themselves* led the Petitioners into the transactions at issue.

In attempting to conceal the conflicts between the Circuit Courts of Appeal on the "reliance" issue, Respondents also contend that the Fourth Circuit Court of Appeals has retreated from its decision in *Brandenburg v. Seidel*, 859 F.2d 1179, 1187-88 n.10 (4th Cir. 1988), which held that "reliance is necessary to establish injury to business or property 'by reason of' a predicate act of mail fraud . . . ." Respondents' Brief at pages 20-21. In truth, the case which Respondents cite, *Mid-Atlantic Telecom, Inc. v. Long Distance Services*, 18 F.3d 260, 263 (4th Cir. 1994), while it questions the holding in *Brandenburg*, does not overrule it. Moreover, even if *Mid-Atlantic Telecom*, did overrule the reliance language of *Brandenburg*, this would simply mean that the Second Circuit Court of Appeals was in conflict with *four* other circuits rather than three.

Further, in an effort to portray the Second Circuit as in accord with the other circuits on the reliance issue, Respondents cite *County of Suffolk v. Long Island Lighting Company*, 907 F.2d 1295 (2d Cir. 1989), for the proposition that the Second Circuit has *not* held that such reliance is necessary to establish RICO standing. Respondents' Brief at 22. Ironically, this was exactly the position taken by the Petitioners in both the District Court and the Second Circuit Court of Appeals, that was rejected by both Courts. Indeed, in rendering their decisions, neither Court even mentions *County of Suffolk* despite the fact that this Court relied on it in *Holmes*. *Holmes*, 503 U.S. at 274 n. 19.

On the contrary, the District Court below expressly assumed that there *was* such a reliance requirement, holding "I assume, without deciding, *that the reliance element of the plaintiffs' mail and wire fraud racketeering acts* is established by HUD's reliance on the fraudulent statements." (App. at 25a, n.6) (Emphasis added). The Second Circuit decision in this case thus effectively affirms the requirement of reliance on the misrepresentations or mail and wire frauds as an element of "transaction causation." (App. at 6a).

POINT II: RESPONDENTS' CONTENTION THAT PETITIONERS' INJURIES WERE ATTENUATED AND INDIRECT, AND THAT HUD WAS THE ONLY DIRECTLY INJURED PARTY, IS ERRONEOUS AS A MATTER OF FACT AND LAW

Respondents assert that "Assuming that respondents misrepresented the condition of the housing project to HUD, HUD — and only HUD — sustained any direct injury *because*

it would have been deprived of the rent subsidies under false pretenses and was in the optimum position to 'vindicate the law as a private attorneys general without any of the problems attendant upon suits by plaintiffs injured more remotely.'"[3] Respondents' Brief at 24 (citing *Holmes, supra)* (Emphasis added).

This assertion misstates HUD's relationship to the stolen monies, ignores Petitioners' relationship to those funds, and incompletely describes the acts of mail fraud. Specifically, their assumption that HUD "owned " the rent subsidy money paid to Respondents each month is wrong as a matter of law.[4] On the contrary, the monies used by HUD to pay the rent subsidies, rather than being *owned* by HUD, were appropriated and earmarked by Congress to fund the specific Housing Assistance Payment contract of which these Petitioners were the third party beneficiaries. (App. at 35a-36a; *see also*, Petition for a Writ of Certiorari at 17-20).

---

[3] Respondents misrepresented far more than the *condition* of the housing project. They also deceived HUD for a decade as to their criminal diversion of project repair and maintenance funds and misled HUD as to Respondents' purported plans to repair and improve hundreds of building code violations.

[4] Respondents also fail to explain how HUD — a federal agency — would be in the optimum position to act as a *private* attorney general. If, by that, Respondents mean that the federal subsidy money that they embezzled could be recovered *by HUD*, then they are incorrect as a matter of law because all moneys recovered in such a lawsuit would go to the United States Treasury, not to the agency. Moreover, this recovery would in no way redress the diminution in the value of petitioners' leaseholds, directly caused by Respondents' fraudulent scheme.

Respondents further claim that Petitioners ". . . merely claim that Respondents failed to properly maintain Medgar Evers Houses." Respondents' Brief at 24. This statement mischaracterizes the Complaint, implying that Petitioners merely alleged incompetent or negligent management on the part of the Respondents, as if that were an independent, intervening factor in the catastrophic deterioration of the project.

The Petitioners' actual complaint, of course, is that Respondents stole a substantial portion of the money paid to Respondents by HUD *and* the tenants, mandated for operating, repairing and maintaining the premises, and kept that money for themselves. Respondents successfully engaged in this fraudulent scheme for more than a decade by lying to HUD not only about the actual conditions of the Project and their promises to make improvements, but also about how these commingled rent monies were being used. The foreseeable and inevitable damage to the value of Petitioners' leaseholds — which flowed from a looting scheme largely implemented through acts of mail and wire fraud — is in no way attenuated or remote from either Respondents, with whom Petitioners were in direct and third party privity, or their acts, which were designed to and did loot the Project account containing the operation and maintenance monies for Petitioners' apartments.

Where Congress imposes on a federal agency the duty to oversee and regulate the conduct of certain persons, businesses and enterprises in order to protect specific classes of private citizens, and to assure that those citizens are not deprived of specific benefits conferred on them by law, it effectively makes that agency responsible for securing the rights and benefits of such classes of people. When the

discharge of that duty is obstructed and prevented by a pattern of deceptions and misrepresentations on which the agency relies, and, as a result, the benefits intended for the class of private citizens are diverted to the benefit of the deceivers, *it is the private citizens who are directly and proximately injured in their property.*

Because the decision of the Court below stands for the opposite proposition, that as a matter of law, such private citizens cannot have been proximately injured, and because the decision below is in conflict with the Courts of Appeal for the First, Third and Fifth Circuits, it should be reviewed and overturned by this Court.

CONCLUSION

For all of the foregoing reasons expressed herein and in the Petition for a Writ of Certiorari, Petitioners respectfully request that this Honorable Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

RICHARD J. WAGNER
Counsel of Record
MARTIN S. NEEDELMAN
PAUL J. ACINAPURA
JIM E. PROVOST
BROOKLYN LEGAL
SERVICES CORP. "A"
80 Jamaica Avenue
Brooklyn, New York 11201
(718) 487-1300

LISA E. CLEARY
FREDERICK B. WARDER
NAOMI J. SCHRAG
PATTERSON, BELKNAP,
WEBB & TYLER LLP
1133 Avenue of the Americas
New York, N.Y. 10036-6710
(212) 336-2000